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Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. 78-629

WILLIAM JOSEPH HICKEY,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page No.

Opinion Below 2

Jurisdiction 3

Questions Presented 4

Constitutional Provisions, and Statutes Involved .. 5

Statement of the Case 14

Statement of the Facts 8-15

Argument

POINT I 16-22

POINT II 23-27

Conclusion 28

Certificate of Service 29

Appendix A — Unpublished Opinion of the United States Court of Appeals for the Fifth Circuit . .30-33

Appendix B — Denial of Petition for Rehearing of United States Court of Appeals for the Fifth Circuit 34

TABLE OF AUTHORITIES

Cases Cited **Page No.**

Brady v. Maryland,
373 U.S. 83 (1963) 23

Carroll v. United States,
267 U.S. 132 (1925) 18

Chambers v. Maroney,
399 U.S. 42 (1970) 17

Chemel v. California,
395 U.S. 752, 763 (1969) 17

Cody v. Dambrouski,
413 U.S. 433 (1973) 19, 20

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 17

Johnson v. United States,
333 U.S. 10, 13-14 (1948) 16

Katz v. United States,
389 U.S. 347 (1963) 17

Preston v. United States.
376 U.S. 364 (1964) 18

Ross v. Texas,
474 F. 2d 1150 (5th Cir. 1973) 25, 26

South Dakota v. Opperman,
428 U.S. 364 (1976) 18, 19

TABLE OF AUTHORITIES (Continued)

Cases Cited **Page No.**

United States v. Agurs,
427 U.S. 97 (1976) 24, 26

United States v. Chadwick,
97 So.Ct. 2476 (1977) 17

United States v. Diggs,
554 F. 2d 166 (3rd Cir. 1976) 19

United States v. Edwards,
554 F. 2d 1331 (5th Cir. 1977) 19

United States v. Haes,
551 F. 2d 767 (8th Cir. 1977) 21

Wong Sun v. United States,
371 U.S. 471 (1962) 21

STATUTES

18 U.S.C. 912 5

18 U.S.C. 924 (c) (1) 6

CONSTITUTIONAL PROVISIONS

Amendment IV. 5

Amendment V. 5

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The Petitioner, WILLIAM JOSEPH HICKEY, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled action on June 8, 1978, in which case the Petitioner was one of the Appellants.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. (Rule 18, Fifth Circuit, See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5th Cir., 1970, 431 F. 2d 409.) The unpublished opinion No. 77-5573 appears as a matter of convenience as Appendix A to this Petition.

JURISIDCTION

The jurisdiction of this Court to review the above mentioned decree of the said Court of Appeals is invoked under the provisions of 28 U.S.C.A., Section 1254(1);

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

QUESTIONS PRESENTED

(1) Whether the District Court erred in failing to grant Petitioner's Motion to Suppress illegally seized evidence where said evidence was obtained in a manner which violated the Petitioner's right to be searched against unreasonable searches and seizures under the Fourth Amendment to the Constitution of the United States.

(2) Whether the District Court erred in denying Petitioner's Motion for Mistrial based on the Government's failure to disclose to the Petitioner's a police fingerprint report which was both exculpatory and material where the Petitioner's had moved for production of favorable evidence, in deprivation of Petitioner's rights to due process of law under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED

The Amendments to the Constitution provide in pertinent part:

AMENDMENT IV.

"The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ."

AMENDMENT V.

"No person . . . , nor be deprived of life, liberty or property, without due process of law; . . ."

18 U.S.C. 912

Officer of Employee of the United States

"Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. 924 (c) (1)

"(c) Whoever-

(1) uses a firearm to commit any felony for which he may be prosecured in a court of the united states, . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one (1) nor more than ten (10) years."

STATEMENT OF THE CASE

The Petitioner, WILLIAM JOSEPH HICKEY was charged by indictment with two counts of impersonating a federal officer and two counts of using a firearm during the commission of the offense of impersonating a federal officer. (R. 1-3) Petitioner was charged along with co-defendant, RICHARD WILLIAM BRAHAM.

A jury trial was conducted before the Honorable Sidney M. Aronovitz, United States District Judge, on July 13-15, 1977 (R. 176-699). The Petitioner was found guilty on all counts and was sentenced to three years imprisonment for each impersonation count, the sentences to run concurrently with each other, and ten years imprisonment for each firearm count, the sentences to run concurrently with each other but consecutively to the sentences for the impersonation counts. (R. 94-99, 135, 139). On July 22, 1977, the Petitioner filed a Motion seeking a new trial; the Motion was denied by a written order filed on August 22, 1977. (R. 120-122, 131).

An appeal was taken to the United States Court of Appeals for the Fifth Circuit. That appeal resulted in the Fifth Circuit affirming the decision of the trial court on June 8, 1978. The Fifth Circuit denied the Petition for Re-hearing on August 14, 1978. The Honorable Mr. Justice Lewis Powell granted the Petitioner an extension for the time in which to file this Petition for Writ of Certiorari up till and including October 14, 1978.

STATEMENT OF THE FACTS

On June 17, 1977, a hearing was held before the Honorable Peter R. Palermo, United States Magistrate, on a Motion to Suppress evidence seized from Petitioner Hickey's automobile. (R. 34-36 143, 175). A Special Agent, Raymond S. Thurman, testified that he arrested the Petitioner pursuant to an indictment on March 4, 1977, in North Miami Beach, Florida. (R. 149, 151). Agent Thurman stated that he had just set up a surveillance of Co-Defendant Braham's home on the morning of March 4, 1977 when the Defendants below drove by in Petitioner HICKEY's automobile. (R. 156, 157). Thurman testified that he arrested the Petitioner by pulling alongside the Petitioner's car, after it had *stopped in traffic*, and he ordered the Petitioner and co-defendant below to exit their car at gunpoint. (R. 160, 161). The defendants below were searched, handcuffed, advised of their rights, and were placed in an assisting agent's car. (R. 161). Thurman stated that the defendants below were told that the car would be taken to the F.B.I. office and that the defendants below were not given an opportunity to secure the vehicle because the car was in the line of traffic. (R. 164, 165). Thurman noted that he had no search warrant at the time of the arrest, but that Agents Mery and Dalde entered the vehicle at the scene of the arrest and looked around in the various parts of the car. (R. 151, 162, 173). Thurman also stated that he personally stuck his head in the door of the car and noted that he may have also looked in the glove compartment. (R. 169, 170). Thurman testified that he noticed a box of Aramis perfume on the floor of the car but that nothing was seized at that time. (R. 163, 170).

Thurman stated that subsequent to the automobile's removal to the F.B.I. office, a complete inventory of items inside the car was made. (R. 163). On March 8, 1977, four days after the inventory at the F.B.I. office, a search warrant was applied for, received and executed on Petitioner Hickey's automobile and at least sixteen items were taken. (R. 166-168).

The Court denied the Petitioner's Motion finding that the arrest, which was pursuant to a legal indictment, was proper and that the initial search, the inventory search, was also proper. (R. 173, 174).

Prior to the selection of the jury panel and pursuant to Petitioner's Motion for Production of Evidence favorable to the accused and for additional discovery, pursuant to Rule 16, Federal Rules of Criminal Procedure and the Court's Order that the parties resolve the discovery matters by themselves, the Government informed the court that all Jencks material had been produced and all other discovery material had been provided. (R. 43, 44, 51-54, 75, 76, 201).

At trial, Special Agent Raymond Thurman testified that on June 16, 1976, he brought two sets of photographs to the home of Mrs. Ronna Ferden in order to have her determine if she could identify the perpetrators of an offense committed in her home the previous April. (R. 253, 254). Thurman selected the photographs on the basis of descriptions given by Mrs. Ferden in the F.B.I. report and on descriptions given by others who were aware of the Petitioner and co-defendant below. (R. 283, 284, 287). Thurman noted that Mrs. Ferden had seen the Petitioner and co-defendant below physically or by picture three times at

the time she was asked to identify them from the photographic groups. (R. 268). Thurman testified that both Mrs. Ferden and her mother, Mrs. Adler, were able to identify the Petitioner and co-defendant below as the men who came to their home impersonating an agent of the Internal Revenue Service. (R. 274-277). Thurman stated that Mrs. Joan Van Anglea identified the Petitioner and co-defendant below from the photograph as the men who posed as F.B.I. agents when they entered her home. (R. 279).

Agent Thurman testified that he was aware that the Petitioner and Co-defendant below appeared in a lineup on May 21st and May 24th, 1976. (R. 308, 310). Thurman stated that he also knew that all three women, Mrs. Adler, Mrs. Ferden and Mrs. Van Anglea, were unable to identify either Petitioner or co-defendant below at the line-up. (R. 310).

Mrs. Ferden noted that she attended a lineup with her mother on May 24, 1976. (R. 347). Mrs. Ferden was not able to identify either Petitioner or co-defendant below in two separate lineups. (R. 352,353). Mrs. Ferden attributed her inability to make a positive identification at the lineup to these factors: she was nervous, the men were dressed differently from the day they entered her home and one of the men did not have a mustache when he appeared in the lineup. (R. 354-356). Mrs. Ferden noted that on June 16, 1976, she identified both Petitioner and co-defendant below from the photographs shown to her by Agent Thurman. (R. 333-336). At trial, Mrs. Ferden stated that she was positive that the Petitioner and co-defendant below were the men who came to her home on April 28, 1976. (R. 357).

Betty Adler testified that after the police arrived she was shown some photographs to see if she could recognize the men. (R. 367, 368). Mrs. Adler noted two photographs of men she thought could possibly be the perpetrators. (R. 369). The photographs Mrs. Adler stated that she attended the May 24, 1976, lineup and was unable to identify anyone because of the way the men were dressed. (R. 371-374). At trial, Mrs. Adler testified that there was no question in her mind that the Petitioner and co-defendant below were the perpetrators. (R. 375).

Joan Van Anglea testified that she received a call from a man claiming to be an F.B.I. Agent at 9:15 A.M. on March 11, 1976. (R. 394). The caller wanted to send two men over to inquire about a maid who Mrs. Van Anglea employed who was suspected of cashing bogus welfare checks. (R. 394, 395). Mrs. Van Anglea stated that within fifteen minutes, two men, who flashed a badge and claimed to be from the F.B.I. showed her two photographs. (R. 395, 396). After Mrs. Van Anglea was unable to identify the photographs, the men said they would return with more recent pictures. (R. 396, 397). The men returned within two minutes stating that they would like to leave the photographs with Mrs. Van Anglea and also that they needed a pen to write their phone number, so that Mrs. Van Anglea could get in contact with them. (R. 398). When Mrs. Van Anglea went to get a pen, the men followed her, placed a gun to her head and led her into the bedroom. (R. 399). The men tied her hands and ankles with plastic cuffs and ransacked her dressing room and bedroom. (R. 402, 403). Mrs. Van Anglea testified that after the men had left, she was able to get to the front door, and scream for help. (R. 407).

Mrs. Van Anglea gave descriptions of both perpetrators to an officer of the Bal Harbor Police Department and to Agent Thurman. (R. 417-430, 424, 425). Mrs. Van Anglea stated that she attended both the May 21 and May 24, 1976 lineups. (R. 427, 429, 435). Mrs. Van Anglea testified that she could not identify either Petitioner or co-defendant below in the May 21st lineup because she was tired from a long wait at the Police Station and because the men were dressed differently, noting in particular that the men no longer had mustaches. (R. 431, 432). Mrs Van Anglea cited changed appearances as the reason she could not make an identification on May 24, 1976. (R. 349). At trial, Mrs. Van Anglea could now state that she was certain that the Petitioner and co-defendant below were the men in her apartment on March 11, 1976. (R. 451).

Special Agent Benjamin Grogan testified that on March 4, 1977, he drove the car in which the Petitioner and Co-defendant below had been in, to the F.B.I. office from the scene of the arrest. (R. 452, 453). With the assistance of two other agents, Grogan inventoried the car and wrote down what was there; a tan sport coat, blue jacket, and a box which was found to contain a gun. (R. 453, 454). The Petitioner and co-defendant below renewed their objection to the gun on the ground it was illegally seized. (R. 457). The judge overruled the objection. (R. 458).

Frederick Stief, III, a police technician for the Public Safety Department, testified that he went to the Ferden's home on April 28, 1976, and processed the plastic handcuffs for latent fingerprints. (R. 460, 461) Stief noted that there was an official comparison report which he didn't have, but that he had an informal report

which stated that three latents were lifted and that none were identified. (R. 464, 465). The Petitioner and co-defendant moved for a mistrial on the ground that the Government had failed to comply with the Court's mandate under Rule 16 of the Federal Rules of Criminal Procedure and under *Brady*. (R. 466-468). The court at first received ruling and then denied the motion for mistrial stating that the materiality of the report had not been established and that it's exculpatory nature, if any, was minimal. (R. 469, 499).

Andre Fortier, an F.B.I. Agent, testified that he searched the Petitioner's car on March 8, 1977, pursuant to a search warrant he had received. (R. 472, 473). Fortier found a bottle of Viking Spirits gum, which he stated was used to glue on false facial hair, two false mustaches, and a Van Dyke goatee. (R. 474, 476).

The Petitioner and co-defendant moved for a directed verdict on the ground that the Government failed to establish a prima facie case. (R. 501). The court denied the judgment of acquittal on all counts.

George Gold, an attorney who represented the Petitioner and co-defendant below at the time of the lineup, was present at the lineup when Van Anglea attempted to make an identification. (R. 513, 514, 519). Gold stated that Van Anglea did not identify the Petitioner and co-defendant but instead identified some other individuals. (R. 521, 523). Gold noted that at no time did Mrs. Van Anglea complain that she could not identify the Petitioner and co-defendant below due to physical exhaustion or other reasons. (R. 523).

Alex Spector, a Bay Harbor Police Officer, was one of the first policemen to arrive at the Ferden home on April 28, 1976 (R. 543, 544). Officer Spector got a description of the perpetrators from Mrs. Ferden, Mr. and Mrs. Adler, and Mrs. Collins, the maid. (R. 544, 545). Officer Spector picked up ten photographs from the stationhouse and displayed them to the people on the Ferden home. (R. 546, 548). The victims identified Scott Worthington and Leonard Fury as the perpetrators. (R. 549).

Aaron Campbell, an officer with the Public Safety Department, conducted the lineups in which the Petitioner was present. (R. 563, 564). Campbell noted that Co-defendant Braham slouched in the lineup and that no identification was made in either lineup. (R. 571, 572). Campbell stated that none of the witnesses who viewed the lineup had told him that they could not make an identification due to the slouching. (R. 572, 573).

Sherman Foreman, a court reporter hired of the firm of Moran and Gold, was present at both the May 21 and May 24, 1976 lineups. (R. 574, 575). Foreman stated on May 21, Van Anglea identified Dennis Hull and Dan Bursey in a lineup which included co-defendant Braham. (R. 577, 580, 582). On May 24, 1976, Mrs. Van Anglea noted that Dennis Hull looked familiar and then selected Steve Stein from a lineup which included Petitioner Hickey. (R. 583-585, 587). Foreman testified that Mrs. Van Anglea did say it was difficult to make an identification due to the different clothes. (R. 589). Foreman stated that Mrs. Adler selected Dan Bursey as the perpetrator. (R. 586). Foreman noted that on the

four lineups held over two days, no one had identified either Petitioner Hickey or co-defendant below, Braham. (R. 586, 587).

The Petitioner and co-defendant below renewed their motion for judgment of acquittal at the close of all the evidence. (R. 627). The court denied the Petitioner and co-defendant below's motion. (R. 627).

The Petitioner thereupon appealed with his co-defendant below to the United States District Court of Appeals for the Fifth Circuit. The Fifth Circuit confirmed the decision of the trial court on June 8, 1978 and denied the Petition for rehearing on August 14, 1978 and this Petition for Writ of Certiorari then followed.

ARGUMENT

POINT I

WHETHER THE DISTRICT COURT ERRED IN FAILING TO GRANT PETITIONER'S MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE WHERE SAID EVIDENCE WAS OBTAINED IN A MANNER WHICH VIOLATED THE PETITIONER'S RIGHT TO BE SEARCHED AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denied law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterest determination to issue a search warrant will justify the officers in making a search without a warrant, would reduce the Amendment to a nullity, and leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

It is the recognition of the protection a search warrant affords against improper governmental intrusions that has led this Court to hold that warrantless searches are per se unreasonable under the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Katz v. United States*, 389 U.S. 347 (1963). This general rule is subject to a few well-delineated exceptions. The record below demonstrates that only two of these exceptions may be pertinent. Search incidental to arrest and inventory search.

SEARCH INCIDENTAL TO ARREST

In *Chemel v. California*, 395 U.S. 752, 763 (1969) the Court held that in order to safeguard himself and others, and to prevent the loss of evidence, an arresting officer may reasonably conduct a warrantless search of the arrestee's person and the area within his immediate control — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. "The reasons the court cited in *Chemel, supra*, which have been thought to justify warrantless searches are not applicable, where the accused is safely in custody or may not gain access to the property to seize a weapon or destroy evidence. *Chambers v. Masonry*, 399 U.S. 42 (1970); *United States v. Chadwick*, 97 S.Ct. 2476 (1977).

In the case at bar, the Petitioner and co-defendant below were effectively placed in custody moments after the agents of the F.B.I. pulled alongside their stopped vehicle. (R. 160, 161). The Petitioner and co-defendant below were searched, handcuffed and placed in an assisting agent's car. (R. 161). From the moment they

were placed in the agent's car, there was no longer any danger that the Petitioner and co-defendant below could seize a weapon or destroy evidence. It follows that the warrantless search at the scene of the arrest and the subsequent warrantless inventory search could not be justified as searches incident to arrest. See *Preston v. United States*, 376 U.S. 364 (1964).

INVENTORY SEARCH

The second exception is a derivative of the automobile exception; the inventory search. This court has recognized and upheld the warrantless search of automobiles for two reasons. First, an automobile is inherently mobile and creates circumstances of emergency that renders enforcement of the warrant requirement impossible. *Carroll v. United States*, 267 U.S. 132 (1925). Second, the expectation of privacy one has in an automobile is less than one may have in his home due to the governmental control over automobiles and the public nature of automobile travel.

As part of its community caretaking function and in the interests of public safety, the police frequently take automobiles into custody. The court in *South Dakota v. Opperman*, 428 U.S. 364 (1976) held that police intrusions into automobiles in their custody would be reasonable if:

> (1) The intrusion was intended to protect the owner's property while it remains in custody.
>
> (2) The intrusion was intended to protect the police against claims or disputes over lost or stolen property.

> (3) The intrusion was intended to protect the police from potential danger.

"To be constitutionally permissible, an inventory search must be no more intrusive than necessary to respond to these goals alone." *United States v. Edwards*, 554 F. 2d 1331 (5th Cir. 1977).

In the instant case, the record is totally devoid of any testimony which would shed light on the agent's purpose when they inventoried the automobile. In *Opperman, supra*, the court stressed that such warrantless searches were reasonable only if they occurred pursuant to the government's caretaking function. Here, the Government has adduced no evidence regarding standard F.B.I. practices which are consistent with this caretaking function. There was not testimony as to the incidents of theft and vandalism which would necessarily require an intrusion into the automobile to search its contents for the benefit of both the owner and the police. In short, there is not one shred of evidence in the record which goes to fulfill any of the three bases which render a warrantless inventory search reasonable under the guidelines developed by the Supreme Court.

This court in *Opperman, supra*, inferred that a warrantless inventory search becomes unreasonable when done as a pretext for an investigatory police motive. Supra, at 3100. See also *United States v. Edwards, supra; United States v. Diggs*, 554 F.2d. 166 (3rd Cir. 1976) (Gibbons J. concurring). In *Opperman*, Justice Burger cited[1] a statement made in *Cody v. Dombrowski*, 413 U.S. 433 (1973) to distinguish the caretak-

[1] *South Dakota v. Opperman*, 428 U.S. 364, 369 (Footnote 4).

ing function engaged in by state officials and the function of federal officials in *Cody* the court said,

> "The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle." Supra, at 440.

Petitioner submits that the federal officials involved in the instant case were acting in furtherance of an investigation into criminal activity when they searched the Petitioner's vehicle, and were not performing any caretaker function.

The scheme of events leading up to and through the time of arrest plainly substantiate that conclusion. Agent Thurman, the arresting officer in the case at bar, indicated that although he had co-defendant below Braham's home under surveillance he made no attempt to approach the home and make an arrest. (R. 156, 157, 159). Agent Thurman *chose to make the arrest in the middle of a lane of traffic* rather than having the Petitioner and co-defendant below pull over to the shoulder or on to a side street as a local police officer would do for an ordinary traffic violation. (R. 160, 161). The Petitioner and co-defendant below were also not given an opportunity to secure the vehicle through their own efforts despite the fact that they were safely in

custody.[2] (R. 165) These circumstances, coupled with the extensive searches of the car's interior at the scene of the arrest as well as back at the F.B.I. offices, indicates that the agents wanted custody of that vehicle and arrested the Petitioner and co-defendant below in a manner which assured them of getting it. It follows that the Government's inventory search is unreasonable within the meaning of the Fourth and Fourteenth Amendments.

The record indicates that a search warrant was obtained *four days* after the Government's inventory on March 4, 1977. (R. 166, 167). Many of the items listed in the inventory were seized pursuant to the March 8, 1977, search warrant. (R. 166, 169). Where a subsequent search is the direct result of information gained from a previous illegal search, the evidence or fruits of the subsequent search must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1962); *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977). It follows that the evidence obtained pursuant to the March 8th search warrant should have been suppressed since the evidence which enabled the agents to procure a warrant was obtained in a manner contrary to the Fourth Amendment to the Constitution of the United States.

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[2] Although the F.B.I. agents were not bound by the provisions of the Dade County Code, Section 30-384 (a) (6) of the Code provides an interesting and proper method of disposing of the vehicles on the public streets. The provisions provide that where a driver is taken into police custody, the department, prior to impounding a vehicle, should the driver with a reasonable opportunity to provide for removal of the vehicle or the owner, may elect to allow the vehicle to remain in place, if lawful.

The Fifth Circuit in their opinion attached as Appendix A to this Petition, found that the inventory search was not unreasonable. Yet they go on to state that, "the vehicle was stopped in the middle of an intersection". (Appendix A). The routine procedures that the police should have taken at that point that the Petitioner and his co-defendant below were removed from the car was to insure that the car was secure and locked, and they would be allowed a cursory examination of the vehicle without taking an inventory at the time. They would also be entitled to do the same type of examination at the police station without an open and full inspection. Since the car was in the custody of the authorities, and they were not going to allow the car to be removed from their custody, it would have been reasonable and in accordance with the decisions of this court for the F.B.I. to have obtained the search warrant prior to the time of taking inventory.

The March 8, 1977 search warrant obtained after the discovery of all the items in the vehicle becomes a nullity and a travesty of the protections of the Fourth Amendment.

POINT II

WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR MISTRIAL BASED ON THE GOVERNMENT'S FAILURE TO DISCLOSE TO THE PETITIONER A POLICE FINGERPRINT REPORT WHICH WAS BOTH EXCULPATORY AND MATERIAL WHERE THE PETITIONER HAD MOVED FOR PRODUCTION OF FAVORABLE EVIDENCE, IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES.

"Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland,* 373 U.S. 83 (1963). The Supreme Court was concerned with convictions that were improperly obtained through deliberate deception or suppression of favorable evidence. To preserve an accused's right to due process of law, the court promulgated the following:

> "We now hold that the suppression by the prosecutor of evidence favorable to an accused upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." *Supra,* at 87.

In the instant case, the Petitioner and co-defendant below made a pre-trial motion for production of all

favorable evidence. (R. 43, 44). The Government told the court that it had turned over all Jencks material and had complied with the discovery mandate. (R. 201). It became apparent during the testimony of Frederick Stief, however, that an official fingerprint report existed and that it had not been turned over to the Petitioner. (R. 464, 466). The Petitioner and co-defendant below's motion for mistrial based on the Government's failure to turn over such material evidence followed. (R. 466, 468).

Where a request for favorable evidence is made, the prosecutor's duty to respond to that request is derived from the exculpatory character of the evidence in his hands. In *United States v. Agurs*, 427 U.S. 97 (1976) the court discussed the standard of materiality which gives rise to a duty of the prosecutor to turn over exculpatory matter and, in the instance where the prosecutor is negligent in his duties, grant an accused a new trial:

> ". . . if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Supra*, at 113.

In the instant case, the central issue for resolution was the identity of the perpetrators of the offense. Technician Stief noted on his report that three latent

fingerprints of value had been lifted from the plastic handcuffs that were used to bind the victims. (R. 464). These prints, however, were not identified. (R. 464). The importance of the more detailed and thorough official report, to which Technician Stief made reference to, is obvious. *It is the comparison of latent fingerprints to fingerprints that are on file that gives the report it's material character.*

One may reasonably assume that the fingerprints report was not turned over the Petitioner and was not introduced into evidence because the latent fingerprints were not those of the Petitioner. The Government would have surely produced the report of its findings were favorable. The Government's claim that it lacked knowledge of the report is insignificant when one considers that it had knowledge that Technician Stief *had* lifted fingerprints on the scene. It follows that the reasonably diligent prosecutor would make an effort to determine the result of the lifting of fingerprints; the fingerprint comparison which is contained in the official fingerprint report. The deterrence of a prosecutor's negligence in failing to bring to light all significant evidence which was known or should have been known to him, has been held to be an important reason for granting an accused a new trial. *Ross v. Texas*, 474 F. 2d 1150. (5th Cir. 1972).

The Government's failure to produce the report prevented the Petitioner from utilizing evidence which was crucial to his defense of misidentification. The report would have been helpful to prove that the Petitioner was not a perpetrator in the incident. Without knowledge of the report, the Petitioner was also deprived of the opportunity to prove whose fingerprints were on that tape.

The materiality of the omitted evidence must be considered in relation to any other evidence on the record. Here, none of the victims of the offenses were able to identify either Petitioner or co-defendant below in a lineup. (R. 586, 587). Mrs. Van Anglea and Mrs. Adler positively identified two men, not the Petitioner, who appeared in the same lineups. (R. 577, 580, 582-587). The people in the Ferden home identified two men — not the Petitioner, just a short time after the offense occurred. (R. 549). The omission of an exculpatory fingerprint report is certainly sufficient to create a reasonable doubt that did not otherwise exist, and in the context of the victims' previous inability to positively identify the Petitioner, serve to deny the Petitioner due process of law. In *Agurs*, the court properly noted;

> ". . . the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Supra*, at 111.

One should not underestimate the effect of a fingerprint report to a jury. In *Ross, supra*, this court recognized the impact of these reports when it noted:

> "We would reach a different result if the undisclosed evidence were a laboratory report showing that another person's fingerprints were on the knife used in the Broushett robbery. Such evidence would be of vital, critical and significant importance in determining the truth of the charges and would have a bearing on the fundamental fairness of the trial." *Supra*, at 1154.

The official fingerprint report is clearly material to the Petitioner's defense and the fairness of the trial. The Petitioner's right to a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment necessitates the granting of a new trial.

CONCLUSION

For the foregoing reasons based on the cases, authorities and policies cited therein, the Petitioner respectfully urges that a Petition for the Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED
GEDRICH & STEIN

BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 13th day of October, 1978.

GEDRICH & STEIN

BY:_____
Harvey N. Gedrich
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5573

SUMMARY CALENDAR*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM JOSEPH HICKEY, and
RICHARD WILLIAM BRAHAM,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(June 8, 1978)

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.

PER CURIAM:

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409.

The defendants, William Joseph Hickey and Richard William Braham, were found guilty by jury of impersonating a federal officer in violation of 18 U.S.C.A. §912 and of using a firearm during the commission of a felony in violation of 18 U.S.C. §924(c)(1). The defendants assign error to (1) the district court's refusal to exclude from evidence a gun which was found during an inventory search of their automobile and to (2) the district court's denial of their motion for a mistrial based on the government's failure to disclose a police fingerprint report. We affirm.

The testimony at trial established that on March 11, 1976, and on April 28, 1976, the defendants, acting as internal revenue agents, entered two residences. Using a gun on both occasions, the defendants tied and bound their victims and then stole various items from the premises. On March 4, 1977, the defendants, pursuant to a grand jury indictment, were arrested at an intersection after their car had stopped for traffic. The defendants were arrested and placed in custody in the back of a patrol car. The defendants' car was immediately taken to the office of the Federal Bureau of Investigation where a complete inventory was made of the articles inside the car. During the inventory a handgun was found in a box which was located on the front floor on the passenger side. The trunk of the car was not searched at this time.

The record reveals that the procedures followed here in making the inventory search of the vehicle were not unreasonable. The vehicle was stopped in the middle of an intersection. It was taken into custody in order to remove it from traffic. When officers lawfully impound a vehicle in the regular course of their duties, the

constitution allows them to search the vehicle if to do so accords with their routine procedures. The routine caretaking procedures of securing and inventorying the car's contents, which were implemented in the case at bar, have been widely sustained as reasonable under the Fourth Amendment. *See South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Edwards*, 554 F.2d 1331 (5th Cir. 1977); *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *United States v. Ducker*, 591 F.2d 1190 (5th Cir. 1974). There is nothing in the record to indicate that the officers had any investigatory motives in searching the vehicle.

Appellants' next contention that the district court erred in refusing to grant their motion for a mistrial is also without merit. The motion for a mistrial came about as the result of testimony of government witness Frederick Stief, a police technician. He was called by the government to prove the chain of custody of some plastic handcuffs which had been used by the perpetrators. During the course of his testimony, he stated that, on one occasion, he had taken some latent fingerprints from such handcuffs. The evidence indicated that the perpetrators had used gloves whenever they handled the cuffs. Further, the evidence was uncontradicted that the latent fingerprints found had never been identified. Finally, the jury was informed that fingerprints found on the cuffs were not the fingerprints of either of the defendants. The motion for mistrial, and the assignment of error, is based upon appellants' contention that the government was required to have informed the defense of a report of the existence of these unidentified fingerprints. The record shows that the prosecutor had never been made aware of and was never in possession of any such report. It was not crucial, critical, or highly

significant to the defense to learn that, on plastic articles, fingerprints were found. The fingerprints were not sought to be used to connect the appellants to the crimes and could only show that these articles had, at some time, been handled by some unidentified member of the general public. The fingerprints did not tend to support any contention made by appellants nor did it indicate in any significant way that the appellants were not the perpetrators of the offense. *See United States v. Crockett*, 534 F.2d 589, 601 (5th Cir. 1976) and cases cited therein.

The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5573

UNITED STATES OF AMERICA,
Plaintiff-Appelle,

versus

WILLIAM JOSEPH HICKEY and
RICHARD WILLIAM BRAHAM,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

(August 14, 1978)

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge